Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

MONTGOMERY BLAIR SIBLEY,

PETITIONER,

VS.

THOMAS S. WILSON, JR.,
BOTH IN HIS CAPACITY AS A JUDGE OF THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA AND PERSONALLY,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Eleventh Circuit Court of Appeals has dismissed as "frivolous" Petitioner's appeal seeking review of the District Court's dismissal of a complaint against a Florida trial court judge.

Accordingly, presented for review are three questions:

WHETHER, the doctrine of judicial immunity extends to immunize Respondent, a Florida state trial judge, who upon pain of contempt of court: (i) forbade Petitioner from appealing any of Respondent's orders and (ii) barred Petitioner from pursuing pending Florida state appellate matters.

WHETHER, the dismissal of Petitioner's appeal by the Eleventh Circuit as "indisputably meritless" and thus frivolous under the authority of its Local Rule 42-4 violates the Rules Enabling Act trespassing as it does upon Rule 38, Federal Rules of Appellate Procedure and the constraints of due process.

WHETHER, Eleventh Circuit Local Rule 36-1, which the Eleventh Circuit maintains gives it the authority to affirm a lower court's decision without issuing any explanation, violates the Rules Enabling Act trespassing as it does upon the Circuit Court's *ratio decidendi* obligation.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, Montgomery Blair Sibley, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on February 9, 2006, and April 24, 2006.

Review is mandated as the Eleventh Circuit has (i) decided an important question of federal law that has not been, but should be, settled by this Court, and (ii) has decided an important federal question in a way that conflicts with relevant decisions of this Court.

OPINIONS BELOW

The September 16, 2005, "Order Granting Motion to Dismiss" is reprinted in the appendix hereto, *Appendix-2.*

The February 9, 2006, order dismissing the appeal is reprinted in the appendix hereto, *Appendix-4.*

The April 24, 2006 order denying re-hearing is reprinted in the appendix hereto, *Appendix-5.*

JURISDICTION

The jurisdiction of this Court is invoked under Article III and the Ninth Amendment to the United States Constitution and 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

U.S. CONSTITUTION ARTICLE III, § 2

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;-- between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

RULES ENABLING ACT, 28 U.S.C. §2071(A)

The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.

RULES ENABLING ACT, 28 U.S.C. §2072(B)

Such rules shall not abridge, enlarge or modify any substantive right.

FEDERAL RULES OF APPELLATE PROCEDURE, RULE 38

Frivolous Appeal-Damages and Costs. If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the Respondent.

FEDERAL RULES OF APPELLATE PROCEDURE, RULE 42(B)

Dismissal in the Court of Appeals. The circuit clerk may dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that are due. But no mandate or other process may issue without a court order. An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court.

UNITED STATES CIRCUIT COURT FOR THE ELEVENTH CIRCUIT, LOCAL RULE 36-1

Affirmance Without Opinion. When the court determines that any of the following circumstances exist:

(a) the judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) a summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) the judgment has been entered without a reversible error of law;

and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

UNITED STATES CIRCUIT COURT FOR THE ELEVENTH CIRCUIT, LOCAL RULE 42-4

Frivolous Appeals. If it shall appear to the court at any time that an appeal is frivolous and entirely without merit, the appeal may be dismissed.

UNITED STATES CIRCUIT COURT FOR THE ELEVENTH CIRCUIT, LOCAL RULE 38

Time for Filing Motions. Motions for damages and costs pursuant to FRAP 38 must be filed no later than the filing of Respondent's brief.

STATEMENT OF THE CASE

This is the second time Petitioner has sued Respondent, a Florida State Circuit Court Judge The first time, hereinafter cited as *"Wilson I"*, the Eleventh Circuit affirmed the District Court's order of dismissal finding that the affirmative defense of judicial immunity barred suit and that the District Court did not abuse its discretion in abstaining from exercising its jurisdiction. The complaint in *Wilson I* was filed on April 29, 2004, and contained allegations of fact only up to that filing date.

This Petition concerns the second time Petitioner sued Respondent – hereinafter "*Wilson II*" – which was filed fifteen months later on August 8, 2005. *Wilson II* presented additional facts which occurred after the filing of *Wilson I*, and sought both injunctive and monetary damage relief.

A. PRE-APRIL 29, 2004 ALLEGATIONS

Petitioner is a party in a dissolution of marriage action between himself and his former wife filed in the Eleventh Judicial Circuit in and for Miami-Dade County, Florida, in which a final judgment of dissolution was entered on September 20, 1994. On January 30, 2003, that matter was assigned to Respondent in his capacity as a judge of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida, as Case No.: 94-18177 FC 19.

On March 24, 2004, Respondent entered his written order in Case No.: 94-18177 FC 19 which, significantly, at ¶8 enjoined Petitioner "from litigating any matters in any state court, including appellate courts, without prior permission from" Respondent. Petitioner immediately sued Respondent in federal district court (*Wilson I)* seeking a declaration that such an order violated constitutional rights and additionally sought damages for denial of his right to appeal.

The District Court dismissed *Wilson I* and Petitioner appealed to the Eleventh Circuit. On March 18, 2005, that Court issued its opinion in *Wilson I.* Significantly, in that order at page 3, that Court found:

> Although [Petitioner] argued that Judge Wilson acted in "complete absence of jurisdiction," thereby preventing an absolute judicial immunity defense, his argument is flawed. [Petitioner] contended that Judge Wilson "elevated himself to determining appellate matters," however, Judge Wilson's order only required [Petitioner] to seek permission before initiating any appeals in the state court. **In that order, Judge Wilson did not purport to confer authority upon himself to decide any appeals that [Petitioner] may have.** (Emphasis added.)

B. THE NEW, POST-APRIL 29, 2004 ALLEGATIONS

In February 2004, Petitioner filed a petition for prohibition with the Florida Supreme Court seeking to disqualify certain judges of the Florida Third District Court of Appeal from hearing his matters pending there. That prohibition petition was assigned Case Number SC04-178. On April 14, 2004, the Florida Supreme Court denied Petitioner's petition for writ of prohibition in Case number SC04-178.

On April 29 2004, Petitioner filed a written motion with Respondent for permission as required by the Respondent's order of March 24, 2004, to file a motion for reconsideration in Florida Supreme Court Case SC04-178. Petitioner set this motion for hearing before Respondent on May 10, 2004. The hearing was cancelled by Respondent to preclude the motion from being heard and resolved.

On May 3, 2004, Respondent entered an order against

Petitioner "Granting Renewed Motion to Compel Payment of Attorney Fees". Petitioner filed a notice of appeal of the May 3, 2004, order which was assigned Case No.: 3D04-1260 by the Florida Third District Court of Appeal.

On August 2, 2004, Petitioner filed his "Motion for Leave to Proceed in Appellate Matter 3D04-1260" with Respondent. On September 22, 2004, Respondent finally held a hearing on Petitioner's April 29, 2004, and August 2, 2004, motions for leave to pursue his pending appellate matters but Respondent did not enter an order at the conclusion of the hearing.

It was not until November 8, 2004, that Respondent finally entered his order on Petitioner's April 29, 2004, and August 2, 2004, motions to pursue his pending appellate matters.

In that order of November 8, 2004, Respondent – expressly usurping the jurisdiction of superior courts: (i) **denied** to Petitioner permission to file a motion for reconsideration in Florida Supreme Court Case No.: SC04-178 and (ii) **denied** to Petitioner permission to proceed in Florida Third District Court of Appeal Case No.: 3D04-1260.

As a result of Respondent's conferring authority upon himself to decide Petitioner's pending appellate matters and his grotesque usurpation of appellate authority, Petitioner was denied by Respondent his right to seek rehearing in Florida Supreme Court Case No.: SC04-178 and to pursue his appeal in Florida Third District Court of Appeal Case No.: 3D04-1260 which was subsequently dismissed.

C. DISTRICT COURT PROCEEDING

As a result of these post-April 29, 2004, events, on August 8, 2005, Petitioner filed *Wilson II* with the District Court seeking both declaratory and damage relief. On August 22, 2005, Respondent moved to dismiss the Complaint. Petitioner timely

responded on August 30, 2005.

The District Court entered its "Order Granting Motion to Dismiss" on September 16, 2005. In that order, the District Court held:

> ADJUDGED that the motion is GRANTED. Plaintiff's action is entirely barred based upon several distinct grounds: Res judicata; the domestic relations exception as explained in *Elk Grove Unified School District v. Newdow*, 542 US. 1, 17- 18 (2004); preclusion principles as explained in *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 125 S.Ct. 1517, 1526-27 (2005); and judicial immunity, Eleventh Amendment immunity, and qualified immunity (to the extent Plaintiff seeks costs or fees from Defendant Thomas Wilson Jr). For the foregoing reasons, Plaintiff's complaint is dismissed for lack of subject matter jurisdiction and for failure to state a claim for which relief may be granted.

A timely notice of appeal was filed by Petitioner on October 6, 2005.

D. ELEVENTH CIRCUIT COURT PROCEEDINGS

After briefing, on February 9, 2006, the Eleventh Circuit dismissed Petitioner's appeal stating *in toto*:

> On the Court's own motion, this appeal is hereby DISMISSED as frivolous. *See* 11th Circ. R. 42-4. All pending motions are DENIED AS MOOT.
>
> Petitioner is cautioned that, should he continue to file frivolous appeals, the Court will subject him to monetary and/or non-monetary

sanctions

Petitioner timely filed his motion for rehearing *en banc* raising four issues:

1. That the Appeal was not substantively frivolous;

2. That 11th Cir. Rule 42-4 conflicts with Fed.R.App.P. 38 and thus is invalid;

3. That the Eleventh Circuit impermissibly chilled Petitioner's exercise of his constitutional and "pre-constitutional" right to access the courts by cautioning him that future frivolous appeals may result in the imposition of sanctions;

4. That the Eleventh Circuit lacks authority to decide an appeal without articulating the reasons for its decision.

On April 24, 2006, the Eleventh Circuit issued its order denying Petitioner's motion for rehearing *en banc*. That order addressed Petitioner's points as follows:

1. **The Appeal was not substantively frivolous** – "When this Court dismisses an appeal as frivolous, . . . it is deciding the appeal on the merits."

2. **That 11th Cir. Rule 42-4 conflicts with Fed.R.App.P. 38 and thus is invalid** – the Eleventh Circuit refused to address the conflict between the limitations on Court made rules imposed by the Rules Enabling Act and Rule 42-4.

3. **That the Eleventh Circuit impermissibly chilled Petitioner's exercise of his constitutional and "pre-constitutional" right to access the courts by cautioning him that future frivolous appeals may result in the imposition of sanctions** – "Appellant has not been subjected to any sanctions for pursuing this appeal; he has merely lost. . . .We reject out of hand Appellant's

suggestion that the warning included in our February 9 order would deter any reasonable litigant from bringing an appeal based on any colorable legal or factual argument."

4. **That the Eleventl Circuit lacks authority to decide an appeal without articulating the reasons for its decision** – The Eleventh Circuit said we have the authority because we say we have the authority stating: "The February 9 order gave adequate explanation for our disposition of this appeal – i.e., that the appeal was frivolous and entirely without merit. . .This Court has authority to affirm a lower court's decision without issuing any explanation whatsoever."

This timely Petition followed.

REASONS FOR GRANTING THE WRIT

First, by its decisions in *Wilson I* and *Wilson II*, the Eleventh Circuit has radically expanded the judicially-created doctrine of Judicial Immunity to immunize from all liability a trial court judge who not only prevents appeals of his own orders, but determines and dismisses appeals pending in superior courts. This result is in clear conflict with this Court's holding in *Bradley v. Fisher*, 80 U.S. 335 (1872).

Second, solely by self-empowerment, the Eleventh Circuit has through adoption of Local Rule 42-4 "Voluntary Dismissals" determined that it can *sua sponte* dismiss an appeal without notice or an opportunity to be heard in violation of the Rules Enabling Act's imposition of the due process right to notice and an opportunity to be heard.

Last, solely by self-empowerment, the Eleventh Circuit has through adoption of Local Rule 36-1 determined that it can dismiss an appeal without explanation in violated the Rules Enabling Act's imposition of the *ratio decidendi* obligations placed upon a federal court as recognized in this Court's decision in *Black v. Romano,* 471 U.S. 606 (1985).

I. THE DOCTRINE OF JUDICIAL IMMUNITY IS NOT AVAILABLE TO A TRIAL JUDGE WHO USURPS THE JURISDICTION OF AN APPELLATE COURT

In *Wilson I,* Respondent did not actually decide any of the appeals Petitioner had, only reserved the right to decide any appeal Petitioner may have had. Thus, the Eleventh Circuit found that this reservation by Respondent only required Petitioner "to seek permission before initiating any appeals in the state court" and thus judicial immunity applied.

In stark contradistinction, the Complaint in *Wilson II* alleges that Respondent has – post-*Wilson I* – "purport[ed] to confer

authority upon himself to decide any appeals that [Petitioner] may have" in two instances.

First, Respondent entered an order denying to Petitioner permission to file a motion for reconsideration in Petitioner's pending Florida Supreme Court Case No.: SC04-178. Respondent's order stated:

> [Petitioner] sought to file a Motion for Rehearing, Clarification, and Request for Written Decision with regard to the Petition for Writ of Prohibition in Supreme Court Case No. SC04-178. The Supreme Court has already decided this appellate matter by denying the Writ of Prohibition with prejudice and without written opinion. [Petitioner] has not proffered to this Court what he contends the Supreme Court overlooked and/or misapprehended which would justify a motion for rehearing. Consequently, this request is Denied. *See R.J. Reynolds Tobacco Company v. Florence Kenyon*, etc., 29 Fla. L. Weekly, S462.

Plainly, Respondent is "purport[ing) to confer authority upon himself to decide" Petitioner's motion for reconsideration of his appeal in Florida Supreme Court Case No. SC04-178. This conclusion follows as the decision to grant or deny Petitioner's Motion for Rehearing, Clarification, and Request for Written Decision in SC04-178 is reserved exclusively to the Florida Supreme Court – not Respondent, a judge of the Florida Circuit Court.

Moreover, by citation to *R.J. Reynolds Tobacco Company*, Respondent is plainly determining in his usurped the authority of the entire Florida Supreme Court that Petitioner's proffer to him was insufficient under the rule articulated in *R.J. Reynolds Tobacco Company*. Indisputably, the Florida Supreme Court – and not Respondent – has jurisdiction to determine the merits of

Petitioner's Motion for Rehearing, Clarification, and Request for Written Decision in Florida Supreme Court Case No. SC04-178. As such, Respondent traveled outside the limited scope of his Florida Circuit Court jurisdiction thereby losing any judicial immunity he might otherwise enjoy.

Secondly, in *Wilson II*, Respondent entered an order which stated in pertinent part:

> With regard to the April 20, 2004 order, this order granted Petitioner/Former Wife's ex parte motion to remove $10,000 improperly placed by [Petitioner] in the Court registry. [Petitioner] contends that this money constituted a cash supersedeas bond given to stay a prior order of this Court directing [Petitioner] to pay $10,000 as a purge amount to prevent [Petitioner]'s incarceration for contempt of court. First, assuming [Petitioner] could have superseded the final judgment, [Petitioner] failed to post $11,400, the amount required by Fla.R.App.Pro. 9.310(b)(1) (114% of the final judgment). Second, as the order was not a final money judgment but a judgment of contempt, setting a purge amount, a stay was not automatic and [Petitioner] had to request a stay which he failed to do. Third, in order to purge the contempt, [Petitioner] was ordered to pay the $10,000 directly to Petitioner/Former Wife, which he failed to do in a direct violation of this Court's order. **For all of these reasons, [Petitioner]'s appeal of this order is baseless and his request for leave to appeal this order is Denied.** (Emphasis added).

Again, Respondent has elevated himself to the office of a panel of three Florida District Court of Appeal judges and decided all by himself Petitioner's appeal of Respondent's own

April 20, 2004, order, which granted Petitioner/Former Wife's *ex parte* motion to remove $10,000 placed by Petitioner in the Court registry. Thus, by this action, Respondent has "purport[ed] to confer authority upon himself to decide" Petitioner's appeal in plain violation of the Eleventh Circuit's decision in *Wilson I*.

In both instances, Respondent has trespassed upon the authority of the judges of the Florida Supreme Court and Third District Court of Appeal respectively and thus acted outside the scope of his limited Florida Circuit Court jurisdiction thereby dissolving his judicial immunity and rendering himself personally liable for his actions.

The seminal case on "complete absence of jurisdiction" barring judicial immunity is *Bradley v. Fisher*, 80 U.S. 335, 352 (1872). In that case, this Court stated:

> Thus, if a probate court, invested only with authority over wills and the settlement of estates of deceased persons, should proceed to try parties for public offences, jurisdiction over the subject of offences being entirely wanting in the court, and this being necessarily known to its judge, his commission would afford no protection to him in the exercise of the usurped authority.

Here, Respondent, invested as a Florida Circuit Court Judge with authority only over trial court matters elevated himself to determining Petitioner's appellate matters. Indeed, to paraphrase *Bradley*, Respondent – a Florida Circuit Court judge "invested only with authority over trial court matters" – proceeded to determine the appropriateness of appeals which "jurisdiction over the subject" of which "being entirely wanting in" the Florida Circuit Court, "and this being necessarily known to" Respondent, "his commission would afford no protection to him in the exercise of the usurped authority." *Bradley* at 352.

As such, Respondent was acting outside the scope of his limited jurisdiction by denying to Petitioner the right to seek an appeal of Respondent's orders and thus he does not enjoy the benefits of the affirmative defense of judicial immunity.

Accordingly, the Eleventh Circuit's determination that Petitioner's claim that Respondent's conduct was not immunized by the Judicially-created doctrine of judicial immunity was "indisputably meritless" compels this Court to accept jurisdiction for two reasons.

First, the Eleventh Circuit's determination that Petitioner's appeal was frivolous decides an important question of federal law that has not been, but should be, settled by this Court. Doubtlessly this Court is aware of the growing frustration with the broad immunity granted judges which has resulted in the nation-wide movement known as "Jail4Judges". "The Judicial Accountability Initiative Law, J.A.I.L., is a single-issue national grassroots organization designed to end the rampant and pervasive judicial corruption in the legal system of the United States. J.A.I.L. recognizes this can be achieved only through making the Judicial Branch of government answerable and accountable to an entity other than itself. At this time it isn't, resulting in the judiciary's arbitrary abuse of the doctrine of judicial immunity, leaving the People without recourse when their inherent rights are violated by judges."[1]

Here, Petitioner is being branded as "frivolous" for testing the bounds of judicial immunity where Respondent has made himself not only unaccountable to a jury of his peers – but even to superior courts by preventing any appeals of his orders. Is it any wonder that J.A.I.L. is certified as Amendment "E" for the November 2006 Ballot in South Dakota and will likely spread like wildfire across the country?

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1 http://www.jail4judges.org/

By denying this petition and thereby confirming that indeed judges are able to immunize themselves from all review of their actions, this Court will be throwing gasoline on this wildfire just in time for that November election.

Clearly, the important question of federal law as to the scope of the judge-made doctrine of judicial immunity that has not been, but should be, settled by this Court is squarely presented and this Court must accept this petition for review.

Second, the decision of the Eleventh Circuit decides an important federal question in a way that conflicts with the relevant decision of this Court in *Bradley v. Fisher*. The Eleventh Circuit's confirmation of the applicability of the doctrine of judicial immunity for Respondent's actions without reconciliation with *Bradley*'s express requirement that jurisdiction must not be "entirely wanting in the court" creates a conflict which this Court must resolve.

Therefore, under whatever theory of discretionary jurisdiction this Court is operating under it must grant this Petition for Certiorari. The alternative is to create the absolute power in a trial judge to do anything without consequence to a litigant as no right to appeal is possible and no personal liability can attach to that trial judge's actions.

II. ELEVENTH CIRCUIT LOCAL RULE 42-4 IMPERMISSIBLY TRESPASSES ON FEDERAL RULES OF APPELLATE PROCEDURE, RULE 38

It cannot be gainsaid that the Eleventh Circuit may not trespass by action of its rules of procedure upon Petitioner's "substantive rights". Rules Enabling Act, 28 U.S.C. §2071(a) and §2072(b)("such rules shall not abridge, enlarge or modify any substantive right.")

Here, disingenuously hidden under Rule 42, Federal Rules of Appellate Procedure which relates only to "Voluntary

Dismissals", the Eleventh Circuit has sought to reserve unto itself the right to summarily dismiss an appeal without notice or an opportunity to be heard. At Local Rule 42-4, that Court believes that "[i]f it shall appear to the court at any time that an appeal is frivolous and entirely without merit, the appeal may be dismissed."

Plainly, Congress approved the requirement found at Rule 38, Federal Rules of Appellate Procedure, that "[i]f a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee." No other authority was granted by Congress to dismiss an appeal without such notice and an opportunity to be heard as frivolous.

Hence, the Eleventh Circuit may not dismiss an appeal as "frivolous" as the Panel has done here without providing Appellant "notice from the court and reasonable opportunity to respond."

III. ELEVENTH CIRCUIT LOCAL RULE 36- 1 VIOLATES THE RULES ENABLING ACT

The Eleventh Circuit maintains that Eleventh Circuit Local Rule 36-1 gives it the authority to affirm a lower court's decision without issuing any explanation. This Local Rule violates the Rules Enabling Act which requires that such a local rule "shall not abridge, enlarge or modify any substantive right."

The "substantive right" that this Local Rule trespasses upon is the Constitutional obligation of a court to express its *ratio decidendi* for its decision. Absent that articulation, neither *stare decisis* is assured nor can this Court make its determination to exercise its jurisdiction.

In *Black v. Romano,* 471 U.S. 606 (1985), Justice Marshall in his concurrence wrote:

> the theme unifying these cases is that whether due process requires written reasons for a decision, or for a particular step in the decision making process, is, like all due process questions, to be analyzed under the three-factor standard set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976). When written reasons would contribute significantly to the "fairness and reliability" of the process by which an individual is deprived of liberty or property, *id.*, at 343, reasons must be given in this form unless the balance between the individual interest affected and the burden to the government tilts against the individual. *Id.*, at 335. Whether written reasons would make such a contribution in any particular case depends on a variety of factors, including the nature of the decision making tribunal, the extent to which other procedural protections already assure adequately the fairness and accuracy of the proceedings, and the nature of the question being decided. (Footnotes omitted.)

Here, the Eleventh Circuit has failed and refused to give its *ratio decidendi* for its finding that Petitioner's claim regarding judicial immunity was "indisputably meritless".

First, this refusal is inappropriate given the appearance of retaliation by the Eleventh Circuit against Petitioner for his filing of a suit against three of the judges of that court.[2]

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[2] Judges Gerald Bard Tjoflat, Joel F. Dubina and Phyllis A. Kravitch are defendants in a suit in which Petitioner is the Plaintiff. That suit is pending in the U.S. District Court for the District of Columbia and has been assigned Case Number: 1:06-cv-00107-RMC.

Second, by dismissing *Wilson II* as "frivolous", the Eleventh Circuit avoids the uncomfortable duty of explaining the conflict between the result in *Wilson II* and *Wilson I*. In particular, the district court in *Wilson I* found no bar to its jurisdiction under "the domestic relations exception as explained in *Elk Grove Unified School District v. Newdow*, 542 US. 1, 17- 18 (2004); preclusion principles as explained in *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 125 S.Ct. 1517, 1526-27 (2005)" as it did in *Wilson II*. Given that the only difference between *Wilson I* and *Wilson II* was additional post-*Wilson I* facts, how then is the jurisdiction present in *Wilson I* to determine that an affirmative defense – judicial immunity – is possible but no jurisdiction is present in *Wilson II*?

Last, the implications of the Eleventh Circuit branding Petitioner as "frivolous" without explanation is significant. Plainly, Petitioner will be "chilled" in presenting further cases to the Eleventh Circuit for fear that further sanctions will follow his appeals to that Circuit as Petitioner has no way of knowing what is and what is not considered "frivolous" by that court.

Thus, given that (i) Petitioner has pending a suit for personal liability against three of the judges of the Eleventh Circuit, (ii) the readily apparent conflicts between the results in *Wilson I* and *Wilson II*, and (iii) the far reaching implications of "chilling" without explanation Petitioner in future appeals, this Court must act to impose an obligation on the Eleventh Circuit to limit its *ex cathedra* decision making by binding on to it the obligation of *ratio decidendi*.

The alternative is to permit a Circuit Court to prevent a decision on an issue properly raised by an appellant solely upon its *ex cathedra* determination of an appeal being "indisputably meritless".

CONCLUSION

The implications of denying this petition are substantial.

First, the explicit repeal of the boundaries of *Bradley* by the Eleventh Circuit results in the complete lack of accountability of judges. Henceforth, a judge can silence a litigant by barring under threat of contempt of court any appeal of that judge's order. Is it any wonder that a nation-wide movement to impose a state-constitutional authority to incarcerate judges is gaining momentum?

Second, due process and the Rules of Appellate Procedure demand that Petitioner be given notice and an opportunity to be heard prior to a dismissal of his appeal as "frivolous". The future implications of such a decision – which have been and will be cited in every case Petitioner has pending in a screed of *ad hominem* attacks on him – are severe. To permit such slander of Petitioner invokes the protections of due process. "We review liberty interest claims under the 'stigma-plus' test where '[e]ssentially, a plaintiff claiming a deprivation based on defamation by the government must establish the fact of the defamation "plus" the violation of some more tangible interest before the plaintiff is entitled to invoke the procedural protections of the Due Process Clause". *Cannon v. City of West Palm Beach*, 250 F.3d 1299, 1302 (11th Cir. 2001) (citing *Paul v. Davis*, 424 U.S. 693 (1976)). Here, Petitioner is being stigmatized without the requisite due process rights.

Last, Congress in establishing the inferior courts did not provide for summary dismissals of appeals without explanation. To vest such an authority is to deny the basic right to access court and be insured of a rational decision based upon the tenants of *stare decisis*.

As most eloquently stated by Justice Joseph Story, *Commentaries on the Constitution of the United States* §377-78 (1983): "A more alarming doctrine could not be promulgated by any American court, than that it was at liberty to disregard all former rules and decisions, and to decide for itself, without reference to the settled course of antecedent principles."

Here, without articulation of the basis for its summary dismissal as frivolous decision, the Eleventh Circuit has reserved unto itself to engage in the very "alarming doctrine" that Justice Story articulated: an arbitrary determination of a litigant's case. Plainly, this Court cannot allow the expansion of Circuit Court power in such a manner.

Accordingly, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Montgomery Blair Sibley
Counsel for Petitioner

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OPINIONS BELOW

The September 16, 2005, Order Granting Motion to Dismiss *Appendix-2*

The February 9, 2006, Order Dismissing the Appeal *Appendix-4*

The April 24, 2006, Order Denying Re-hearing . . . *Appendix-5*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
Case Number: 05-22175-CIV-MORENO

MONTGOMERY BLAIR SIBLEY

Plaintiff,

vs.

THOMAS S. WILSON, JR., both in his capacity as a Judge of the Circuit Court of the 11th Judicial Circuit in and for Miami- Dade County, Florida and personally,

Defendant.
_____/

Order Granting Defendant's Motion to Dismiss Complaint

THIS CAUSE came before the Court upon Defendant's Motion to Dismiss Complaint (D.E. No. 9), filed on August 22, 2005.

THE COURT has considered the motion, response, and the pertinent portions of the record, and being otherwise fully advised in the premises, it is

ADJUDGED that the motion is GRANTED. Plaintiff's action is entirely barred based upon several distinct grounds: Res judicata; the domestic relations exception as explained in *Elk Grove Unified School District v. Newdow*, 542 US. 1, 17- 18 (2004); preclusion principles as explained in *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 125 S.Ct. 1517, 1526-27 (2005); and judicial immunity, Eleventh Amendment immunity, and qualified immunity (to the extent Plaintiff seeks costs or fees from

Defendant Thomas Wilson Jr). For the foregoing reasons, Plaintiff's complaint is dismissed for lack of subject matter jurisdiction and for failure to state a claim for which relief may be granted. It is further

ADJUDGED that the Court shall retain jurisdiction to administer sanctions as may be appropriate to preserve the resources of this Court for litigants who do not abuse them.

DONE AND ORDERED in Chambers at Miami, Florida, this 15th day of September, 2005.

/s/ Federico A. Moreno
Federico A. Moreno
United States District Judge

Copies provided to:
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Gaithersburg, MD 20877-4107

Charles J. Crist, Jr.
Florida Attorney General

A-4

In the United States Court of Appeals
For the Eleventh Circuit

No.: 05-15699-BB
(February 9, 2006)

MONTGOMERY BLAIR SIBLEY

Petitioner-Plaintiff,

vs.

THOMAS S. WILSON, JR.,
both in his capacity as a Judge of the Circuit Court of the 11th Judicial Circuit in and for Miami- Dade County, Florida and personally,

Respondent-Defendant

BEFORE: BLACK, CARNES, and BARKETT, Circuit Judges.

BY THE COURT:

On the Court's own motion, this appeal is hereby DISMISSED as frivolous. See 11th Circ. R. 42-4. All pending motions are DENIED AS MOOT.

Petitioner is cautioned that, should he continue to file frivolous appeals, the Court will subject him to monetary and/or non-monetary sanctions.

In the United States Court of Appeals
For the Eleventh Circuit
(April 24, 2006)

No.: 05-15699-BB

MONTGOMERY BLAIR SIBLEY

Petitioner-Plaintiff,

vs.

THOMAS S. WILSON, JR.,
both in his capacity as a Judge of the Circuit Court of the 11th Judicial Circuit in and for Miami- Dade County, Florida and personally,

Respondent-Defendant

BEFORE: BLACK, CARNES, and BARKETT, Circuit Judges.

BY THE COURT:

This was an appeal from the order dismissing on multiple grounds Petitioner's second 42 U.S.C. § 1983 action against Respondent, in one of the recent incarnations of the "multi-headed leviathan of meritless litigation"[3] Petitioner has spawned due to his unhappiness with state trial and appellate courts' rulings in post-divorce proceedings. On February 9,2006, we dismissed this appeal as frivolous *sua sponte* pursuant to 11th Cir. R. 42-4 (Frivolous Appeals). Petitioner, a practicing attorney

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[3] See *Sibley v. Lando*, 437 F.3d 1067, 1069 (11th Cir. 2005).

appearing *pro-se*[4] has filed a "Petition for Rehearing En Banc," construed as a motion for reconsideration of our dismissal order and for suspension of 11th Cir. R. 35-4 (Matters Not Considered En Banc).

In addition to arguing that this appeal was not substantively frivolous, Petitioner argues that 11th Cir. Rule 42-4 conflicts with Fed.R.App.P. 38 and thus is invalid; (ii) the Court impermissibly chilled Petitioner's exercise of his constitutional and "pre-constitutional" right to access the courts by cautioning him that future frivolous appeals may result in the imposition of sanctions; (iii) the Court lacks authority to decide an appeal without articulating the reasons for its decision; (iv) the *en banc* Court must decide whether it is "judicial treason" to avoid deciding an appeal by summarily dismissing it.

Contrary to Petitioner's ill-founded assertions, there is no conflict between 11th Cir. R. 42-4, which allows this Court to dismiss an appeal at any time if it appears that the appeal is frivolous and entirely without merit, and Fed.R.App.P. 38, which authorizes a court of appeals, upon motion or notice and opportunity to be heard, to assess attorney's fees and double costs as sanctions for a frivolous appeal. Petitioner has not been subjected to any sanctions for pursuing this appeal; he has merely lost. When this Court dismisses an appeal as frivolous, whether on an appellee's motion or *sua sponte*, it is deciding the appeal on the merits -- or, more precisely, on the complete lack thereof.

In dismissing the appeal, this panel had the benefit of Petitioner's October 31, 2005, brief and readily concluded that it contained

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[4] As a practicing attorney, Petitioner is not entitled to the liberal construction of his filings generally accorded pro se litigants. See *Olivares v. Martin*, 555 F.2d 1192, 1194 at fn. 1 (5th Cir. 1977). *Olivares* is binding on this Court because it was rendered before October 1, 1981. See *Bonner v. City of Pritchard*, 66 1 F.2d 1206, 1209 (1th Cir. 1981) (*en banc*).

no colorable argument supporting reversal. "Factual allegations are frivolous...when they are 'clearly baseless' ... Legal theories are meritless when they are 'indisputably meritless.'" *Prather v. Norman*, 901 F.2d 915,918 (11th Cir. 1990) (discussing predecessor to 28 U.S.C. 8 19 15(e)(2); citations omitted). Since Petitioner had waived any argument not presented in his initial brief, see *U.S. v. Levy*, 416 F.3d 1273, 1275-1276 (11th Cir. 2005), summary disposition of this appeal was appropriate. See *Groendke Transport v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969). "We can think of at least two circumstances under which summary disposition is necessary and proper ....[one of which is where] the appeal is frivolous." *Id.*

We reject out of hand Petitioner's suggestion that the warning included in our February 9 order would deter any reasonable litigant from bringing an appeal based on any colorable legal or factual argument. However, "...the right to an appeal does not grant a party a license to clog the appellate docket by advancing meritless arguments for the sole purpose of harassing the prevailing party and subjecting it to undue time and expense.". *Horoshko v. Citibank, N.A.*, 373 F.3d 248, 250 (2d Cir.2004) (citing *Rodriguez Alvarez v. Bahama Cruise Line, Inc.*, 898 F.2d 312, 317 (2d Cir. 1990)).

Petitioner may not demand that the Court expend limited judicial resources detailing its reasons for rejecting each of the patently baseless arguments Petitioner presented in his brief. The February 9 order gave adequate explanation for our disposition of this appeal -- i.e., that the appeal was frivolous and entirely without merit.[5]

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[5] This Court has authority to affirm a lower court's decision without issuing any explanation whatsoever, although we very rarely do so. See 11th Cir. R. 36-1 (describing the circumstances under which the Court may affirm without opinion).

A dismissal order is an administrative disposition of an appeal, and the Court treats a request to revisit such an order as a motion for reconsideration by the original panel, even if the request is styled as a petition for rehearing en banc. See 11th Cir. R. 35-4. The Court occasionally suspends Rule 35-4. See *Dorelien v. Attorney General*, 317 F.3d 1314 (11th Cir. 2003) (reflecting that the Court was polled as to whether to hear *en banc* an alien's motion to reconsider the denial of his motion for stay of removal). However, there is no reason for the Court to suspend the rule here.

The "Petition for Rehearing En Banc" is DENIED.